UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

EMERALD GREEN BUILDING SERVICES, LLC **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ** **and** **INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 25** **(Party to the Contract)**	**Case Nos. 01-CA-147341** **01-CA-147345**

REPLY BRIEF IN SUPPORT OF GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

On October 20, 2015,[1] Counsel for the General Counsel ("General Counsel") filed Cross-Exceptions and a Brief in Support of Cross-Exceptions. On October 28, Respondent filed an Answering Brief to the Cross-Exceptions. Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board ("Board"), General Counsel files this Reply Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision.

ARGUMENT

I. GENERAL COUNSEL REQUESTS THAT THE BOARD STRIKE RESPONDENT'S ANSWERING BRIEF

Respondent's Answering Brief fails to comply with Section 102.46(f)(1) of the Board's Rules and Regulations because it is not limited to the questions raised in General Counsel's Cross-Exceptions. In fact, Respondent fails to refer to or directly address any Cross-Exceptions in its Answering Brief. When comparing the Answering Brief to Respondent's Brief in Support of its Exceptions, it is obvious that Respondent simply repeated the same arguments in a different order. For example, page three through the top of page four of the Answering Brief are entirely identical to the bottom of page twelve through the top of page fourteen of the Brief in Support of Exceptions. Similarly, pages five through eleven of the Answering Brief are almost identical to pages five through twelve of the Brief in Support of Exceptions.[2] For these reasons, General Counsel requests that the Board strike Respondent's Answering Brief in its entirety. *See Thermofil, Inc.*, 244 NLRB 1056, 1056 n.1 (1979) (granting General Counsel's motion to strike portions of respondent's reply brief because it was not limited to questions raised in cross-exceptions); *see also Indianapolis Mack Sales & Serv., Inc.*, 288 NLRB 1121, 1123 n.3 (1988)

[1] All other dates refer to the year 2015, unless otherwise noted. Abbreviated terms have the same definitions as they had in General Counsel's Brief in Partial Support of the Decision by the Administrative Law Judge.

[2] Respondent simply shifted its discussion of Campo's testimony from the bottom of page seven through page eight of the Brief in Support of Exceptions to the bottom of page four through page five of the Answering Brief.

(granting respondent's motion to strike General Counsel's answering brief because it failed to address only the questions raised in cross-exceptions).

II. RESPONDENT FAILS TO PRESENT ANY VALID ARGUMENTS IN OPPOSITION TO THE CROSS-EXCEPTIONS OR THE ALJ'S DECISION

To the extent the Board considers any of Respondent's Answering Brief as properly before the Board, Respondent fails to present any valid arguments in opposition to General Counsel's Cross-Exceptions or the ALJ's Decision.

A. Cross-Exceptions Relating to Respondent's Refusal to Hire Employees

Although the ALJ correctly concluded that Respondent unlawfully refused to hire Peace Plus discriminatees for employment at Cross Point and Nagog Park, the ALJ only relied on specific testimony while noting there were other "valid" factors that evidenced a discriminatory hiring scheme. ALJD (p. 11, lines 37-46).[3] For that reason, General Counsel filed Cross-Exceptions to the ALJ's failure to make specific findings of fact and conclusions of law specifically regarding these "additional factors." GC Cross-Exception Nos. 1-10.

Although Respondent does not directly address any of these Cross-Exceptions, it does broadly argue that the ALJ incorrectly concluded that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Peace Plus employees in retaliation for their Local 32BJ affiliation and in order to avoid a bargaining obligation with Local 32BJ. Resp. Ans. Br. 2. In support of this argument, Respondent argues that it hired more than fifty percent of the Peace Plus employees "who belonged to Local 32BJ at Cross Point and Nagog Park combined and could not have discriminated against them because of their union membership." Resp. Ans. Br. 2. In other words, Respondent appears to argue that it could not have discriminated against the Peace Plus employees it did not hire because it *did* hire some of the Peace Plus employees.

[3] References to the Decision of the Administrative Law Judge shall be "ALJD ("p. [page number], lines [line numbers]")."

Most importantly, the Board has specifically found that the fact that an employer did not discriminate against all applicants does not bar a finding of a violation because a "discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *Igramo Enter., Inc.*, 351 NLRB 1337, 1339 (2007). In fact, in similar successorship situations, the Board has found employers unlawfully refused to hire certain predecessor employees even though the employers did hire some of the predecessor employees. *See, e.g.*, *Galloway School Lines, Inc.*, 321 NLRB 1422, 1424-25 (1996). Thus, Respondent's decision to hire some of the former Peace Plus employees does not insulate itself from its unlawful refusal to hire the remaining Peace Plus employees.

Furthermore, Respondent's contention that it hired more than fifty percent of the Peace Plus employees is factually incorrect. As the ALJ correctly found, Respondent kept the number of former Peace Plus employees employed at both Cross Point and Nagog Park just below fifty percent. ALJD (p. 7, lines 20-22; p. 8, lines 24-26). At Cross Point, Respondent initially hired seventeen employees and six were former Peace Plus employees. ALJD (p. 6, lines 36-37; p. 7, lines 1-6). At Nagog Park, Respondent initially hired eleven employees and five were former Peace Plus employees. ALJD (p. 8, lines 6-8; p. 8, lines 22-24).

Respondent's inconsistent and misleading arguments regarding whether or not Respondent hired a majority of former Peace Plus employees are perplexing. Despite contending that Respondent did hire a majority of Peace Plus employees, Respondent—once again—does an about turn in its Answering Brief and argues that it is not a successor because it did not hire more than fifty percent of the predecessor's bargaining-unit employees.[4] *Compare* Resp. Ans. Br. 3

[4] Respondent completely ignores Board precedent finding in cases where the successor intentionally discriminated against the unionized predecessor employees to avoid a bargaining obligation, the Board will infer that the predecessor employees would have been retained absent the unlawful discrimination and presume continuity in the

with Resp. Ans. Br. 6-7. Respondent continues to improperly use the number of employees employed by the predecessor as the denominator when determining majority status even though it is the number of employees employed by the successor that is the appropriate denominator. Resp. Ans. Br. 6-7. Respondent also contends that the number of employees to be considered when determining majority status is all of the Peace Plus employees even though the question in a partial successorship case is whether the successor hired a majority of the employees in the portion that the successor took over, rather than a majority of the entire company. Resp. Ans. Br. 6. Thus, Respondent fails to make any argument in response to the Cross-Exceptions or the ALJ's conclusion that it unlawfully refused to hire Peace Plus employees.

B. Cross-Exceptions Relating to Respondent's Bargaining Units at Cross Point and Nagog Park

Although the ALJ properly concluded that Respondent did not meet its burden of establishing that the Cross Point and Nagog Park locations are accretions to a company-wide bargaining unit, the ALJ failed to make a few factual findings that further support this conclusion. ALJD (p. 10, lines 30-32). For that reason, General Counsel filed cross-exceptions relating to the ALJ's failure to make four specific findings showing that Emerald Green employees work at designated locations and there is no evidence of interchange among employees at different buildings. GC Cross-Exception Nos. 11-14.

Although Respondent does not directly address any of the Cross-Exceptions concerning the four particular factual findings, Respondent contends that its collective-bargaining agreement with Local 25 covers a company-wide unit, rather than building specific units. Resp. Ans. Br. 2, 4, 5. In turn, Respondent appears to argue that the agreement permitted Respondent to treat the Cross Point and Nagog Park locations as an accretion to a larger bargaining-unit. Resp. Ans. Br.

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workforce. *See Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 1 (Sept. 13, 2014); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81-82 (1979).

4. In this way, Respondent seems to defend its unlawful recognition of Local 25 by referencing the "after acquired" doctrine established in *Houston Div. of the Kroger Co*., 219 NLRB 388 (1975). The Board has held that an employer's extension of recognition and its application of a multiple location collective-bargaining agreement, pursuant to an after-acquired clause, however, is only lawful upon proof that a majority of the newly acquired employees support the union and that such a showing is required as a matter of law. *See Shaws Supermarkets*, 343 NLRB 963, 963 (2004). Thus, even where a collective-bargaining agreement contains an after-acquired-stores clause, the Board has expressly stated that such a clause "does not relieve the union of its obligation to provide the employer with proof of its majority status among the employees in the group to be added to the existing unit." *Joseph Magnin Co.*, 257 NLRB 656, 656 (1981). Thus, the "after acquired" doctrine does not forgive Respondent and Local 25 from failing to prove majority status nor does it permit Respondent to treat the Cross Point and Nagog Park locations as accretions to a larger bargaining-unit.

CONCLUSION

For the foregoing reasons and for the reasons set forth in General Counsel's Brief in Support of Cross-Exceptions, General Counsel respectfully requests that the Board find that the ALJ erred in connection with the issues addressed in General Counsel's Cross-Exceptions and make the requested findings of fact, conclusions of law, and modifications to the ALJ's recommended order and notice.

Respectfully submitted,
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